

VI. COURT COSTS OF INDIGENT PERSONS FUND

G.L. c.261, §§27A-G

A. INTRODUCTION

Zealous advocacy often requires incurring expenses in preparing and presenting a client's case. For example, it may be advisable to obtain an expert witness or an interpreter, or a blood analysis. Attorneys should familiarize themselves with G.L. c.261, §§27A-G, which provides for payment of expenses through the Indigent Court Costs Fund. Note that it is necessary to obtain prior written approval from the judge for expenses, by filing a motion under this statute. The motion must be accompanied by an affidavit of indigency or a Notice of Assignment of Counsel form and a supporting affidavit of counsel. Counsel should research the law and prepare an argument for hearing before the judge on this motion; if the motion is denied, the attorney should appeal the motion to either the Superior or Appeals Court, depending on which court has jurisdiction (see G.L. c.261, §27D). Counsel should not engage the services of an expert or incur such expenses until s/he has received written court approval for the requested funds under this statute. Attorneys are required to verify work performed by experts by signing and dating the expert's payment voucher and adding the following language: AI certify that the expert or provider who submitted this bill has provided services in this case.

Please note that attorneys may not receive any personal or professional benefit from selecting or using an expert. Experts should be selected by the attorney based upon the experts qualifications and suitability for the case. For assistance in obtaining the names of qualified experts, contact the Forensic Services Director of CPCS.

The text of the statute, sample motions and information regarding payment can be found in a later section of this manual.

B. EXPERT ISSUES IN INDIGENT CRIMINAL DEFENSE

HOW TO OBTAIN THE ASSISTANCE OF AN EXPERT WITNESS

Statutory provisions for the payment of fees and costs on behalf of indigent criminal defendants are found in G.L. c.261, §§27A-G. In order to obtain funds, it must be shown that:

1. The defendant is indigent. This can be established by affidavit, either by the defendant himself or by defense counsel asserting that counsel was appointed upon the finding that the defendant is indigent (specify court and date of indigency determination);
2. The requested expenses are "reasonably necessary to assure the applicant as effective a ... defense ... as he would have if he were financially able to pay." G.L. c.261, §§27C(4). "The test is whether the item is reasonably necessary to prevent the party from being subjected to a disadvantage in preparing or presenting his case adequately, in comparison with one who could afford to pay for the preparation which the case reasonably requires." Commonwealth v. Lockley, 381 Mass. 156, 160-161 (1980).

To obtain authorization for the payment of an expert, a written motion must be filed which, pursuant to Mass. R. Crim. P. 13 ("Pretrial Motions"), should state the amount of money needed, the purpose of the expenditure, and why the expenditure is "reasonably necessary." Accompanying the motion must be an affidavit detailing the "facts relied upon in support of the motion and signed by a person with personal knowledge of the factual basis of the motion." Mass. R. Crim. P. 13(a)(2). In order to make the necessary representations in the affidavit concerning costs of services, a preliminary discussion with the expert is desirable if not indeed required. Although the authorizing statute decrees that the court "shall not deny any request with respect to extra fees or costs if it finds the document, service or object is reasonably necessary" (and "shall not deny any request without first holding a hearing thereon"), G.L. c.261, '27C(4), appellate courts have scrutinized affidavits in this context and have on occasion found them inadequate.

EX PARTE MOTION

On occasion, the defense may have an interest in having the motion for expenses heard ex parte. In this event, a motion for an ex parte hearing on the motion for expenses should be filed. An ex parte motion remains a part of the public record of a case unless the motion is impounded. If you seek an ex parte hearing and wish the motion to be unavailable to the Commonwealth you must request the impoundment of the motion.

Two major principles support ex parte determination of the motion. First, it is beyond question that, but for the defendant's indigence, he would not be placed in the position of being required to reveal to the Commonwealth what pretrial preparation was being undertaken, for example, toward cross-examination of a Commonwealth witness. "Equal protection of the laws" is dishonored by this disparity. See Fourteenth Amendment, United States Constitution; Article 1,

Declaration of Rights. Second, any procedure prescribed for obtaining funds must not obligate the defendant to furnish evidence against himself in violation of constitutional guarantees. Fifth Amendment, United States Constitution; Article 12, Declaration of Rights.

Although caselaw construing G.L. c.261, §§27A-D has established no "right" per se to an ex parte hearing, it has at least been recognized that "the prosecution has no proper role to play in a defendant's motion for defense funds." Commonwealth v. Dotson 402 Mass. 185, 187 (1988). See also Blazo v. Superior Court, 366 Mass. 141, 145 n.8 (1974); United States v. Meriwether, 486 F.2d 498, 505-506 (5th Cir. 1973); Commonwealth v. Haggerty, 400 Mass. 437, 441 (1987); and Mass. R. Crim. P. 14(a)(3)(A).

APPELLATE REVIEW OF DENIAL OF MOTION FOR FUNDS:

G.L. c.261, '27D.

1. After notice of the denial, a notice of appeal must be filed within seven days. This notice of appeal must be filed in the office of the clerk of the court which heard the motion.
2. A stay of proceedings pending appellate resolution of the funds issue should also be requested.
3. The judge must file written findings concerning his denial of the motion within three days of receiving the notice of appeal.
4. The clerk will forward the motion and findings to the single justice of the Appeals Court if the motion was denied in Superior Court, or to the Superior Court if the motion was denied in District or Juvenile Court. A hearing of the appeal will be scheduled by the clerk of the applicable appellate forum.

CAUTION: Defense counsel should be aware of the limits of reciprocal discovery in this context and should be prepared to fight against encroachments. The Commonwealth cannot discover, via "reciprocal discovery," the identity or opinion of an expert witness when the expert was retained by the defendant and will not be used as a witness at trial because his opinion is unfavorable. Haggerty, supra, 400 Mass. at 441.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK,ss.

SUPERIOR COURT DEPARTMENT
NO.

COMMONWEALTH

v.

[CLIENT]

MOTION FOR EXPENSES

Now comes the defendant in the above-entitled matter and moves this Court, pursuant to G.L. c.261, '27C, to authorize payment not to exceed five hundred dollars (\$500) to John Doe, a fingerprint expert.

The defendant states that the requested funds are "reasonably necessary to assure [him] as effective a ... defense as he would have if he were financially able to pay." G.L. c.261, '27C(l); Commonwealth v. Bolduc, 383 Mass. 744, 748 (1981); Commonwealth v. Lockley, 381 Mass. 156, 164 (1980).

[CLIENT]

By his attorney:

[Attorney Name]

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK,ss.

SUPERIOR COURT DEPARTMENT
NO.

COMMONWEALTH

v.

[CLIENT]

MOTION FOR EXPENSES

AFFIDAVIT IN SUPPORT OF MOTION FOR EXPENSES

I, [Attorney Name], depose and say that:

1. Defendant was found indigent by a justice of the Suffolk Superior Court at his arraignment on [Date]. The defendant remains indigent and has no funds to engage the services of a fingerprint expert.
2. Discovery provided by the Commonwealth indicates that fingerprint evidence will be relevant in this case and the Commonwealth intends to call a fingerprint expert to testify at trial.
3. John Doe is a qualified expert. I have discussed with him the issues in this case, and he has advised me that the cost of analyzing the fingerprint evidence and preparing a report will be five hundred dollars (\$500.00). Additional funds will be needed to compensate him for his time if it becomes necessary for him to appear in court.

The above is true to the best of my information and belief and is signed under the pains and penalties of perjury.

[Attorney Name]

C. INFORMATION ON SELECTED ICC SERVICES

1. INTERPRETERS

The Committee pays for interpreter and sign language OUT OF COURT services which have been requested and allowed by motion filed by the defense attorney on behalf of an indigent client, at the rate of \$20 per hour for non-certified interpreters and \$30 per hour for certified and qualified interpreters.

A certified interpreter is one trained and certified by the Office of Court Interpreter Services. A qualified interpreter is one certified by the Office of Court Interpreter Services and who has passed the Administrative Office of the U.S. Courts Federal Certification Examination or a sign language interpreter as determined by the Massachusetts Commission for the Deaf and Hard of Hearing.

Requests for compensation of services should be submitted to the Committee for Public Counsel Indigent Court Cost Department, by the interpreter on a signed payment voucher form which includes an itemization of dates, hours, type of services and rate and a copy of the allowed motion, within 30 days of completion of services.

2. TRANSCRIPTS

The Committee pays for transcriptions, which have been requested and allowed by motion, filed by the defense attorney on behalf of his/her indigent client, or which have been requested by the court as a direct result of the defense attorney's motion to appeal, at the following rates:

Transcripts from notes are paid at the rate of \$3.00 per page for an originally produced (first time produced) page and \$1.00 per page for a copy. Transcripts from tapes are paid at the rate of \$3.00 per page, per original and .75 per page for a copy.

Please note: the Committee for Public Counsel will reimburse for one copy only at the above noted copy rate. Additional copies should be limited to only those which are absolutely necessary and should be produced at a photocopying rate (maximum .10 per page). Postage, handling, bindings and travel expenses are not reimbursed.

Requests for compensation of services should be submitted to the Committee for Public Counsel Indigent Court Cost Department, by the transcriber on a payment voucher form which includes the date(s) of the original hearing(s), the date the transcript was delivered, the total number of pages produced, a copy of the allowed G.L. c.261, §§27A-G motion OR the court order to produce the transcript and proof of indigency (see section on acceptable proofs), within 30 days of completion of services.

Court Reporter Attendance

The Committee will pay for the attendance of a Court Reporter, which has been requested and allowed by motion filed by the defense attorney on behalf of his or her indigent client, at the rate of \$148.48 per day.

Requests for compensation of services must be submitted by the vendor, accompanied by an allowed motion and should be submitted within 30 days of completion of services.

3. PUBLIC NOTICE

The Committee will pay for Public Notices which have been requested by the defense attorney on behalf of his or her indigent client.

A copy of the actual notice or an invoice (showing the name of the newspaper, number of lines, days printed, and rates) and proof of client indigency must be included with the request for payment.

4. SERVICE AND SUMMONS

Requests for Service and Summons made by the defense attorney on behalf of his or her indigent client will be paid at the rate allowed under G.L. c.262, §8. A complete itemization of dates, rates, mileage, party served, proof of indigency and party requesting the service, must be noted on, or attached to, the payment voucher.

Note to attorneys: please be advised that we will reimburse you for costs incurred regarding services and summons up to the amount allowed by G.L. c.262, §8 only. Please notify your vendor as to the correct billing rate prior to contracting services.

5. PSYCHIATRIC EXAMINATION, MEDICATL/LAB TESTING, PRIVATE INVESTIGATORS, EXPERT WITNESSES OR EXPERT ANALYSIS

The Committee will pay for any of the above noted services if they have been requested and allowed by motion filed by the defense attorney on behalf of his or her indigent client, **at an amount not to exceed the allowed motion.**

The attorney is asked to ensure that these services are ones which are reasonably necessary to assure the client as effective a defense as s/he would have if s/he were financially able to pay. Requests for compensation of services must be submitted by the vendor on a payment voucher form, accompanied by an allowed motion pursuant to G.L. c. 261, §§27A-G, including an itemization of dates, hours and rates, and submitted within 30 days of completion of services. Lump sum or flat fee billing will be rejected; further itemization will be requested.

D. PAYMENT FROM THE INDIGENT COURT COSTS FUND

The company or person who performed services may submit a Commonwealth Payment Voucher (PV) and be paid directly. If the attorney has already paid the company or person for services, the attorney may submit a PV in order to be reimbursed. Documentation of that payment must accompany the PV.

Documentation Required:

The Comptroller of the Commonwealth requires complete documentation, including all receipts and an itemization of all expenses, in order to reimburse attorneys for **any** expenditures. Legible receipts in the form of a canceled check, or other document that clearly indicates that the bill was paid, and indicating the date, amount of expenses, and name of vendor must be submitted with the attorney's request for payment.

A sample PV follows, along with instructions for completion. Photocopies of the sample are acceptable for use in billing.

PAYMENT VOUCHER (PV) INSTRUCTION FOR COMPLETION

(Numbers on sample form correspond to numbers below.)

The term vendor is used below in reference to the person or company seeking reimbursement.

REMINDER: THE COMMONWEALTH'S FISCAL YEAR RUNS FROM JULY 1 THROUGH JUNE 30. PLEASE SUBMIT SEPARATE PVs FOR EACH FISCAL YEAR.

The case name and related assignment number must be noted on the PV and proof of services rendered (each date and description of services on business letterhead), proof of payment for services (canceled check or paid receipt from vendor), Attorney Certification (where applicable), and an allowed motion (where applicable) must be attached.

Attorneys are required to verify work performed by experts, investigators and social service providers by signing and dating the expert's payment voucher after adding the following prescribed language:

"I certify that the expert or provider who submitted this bill has provided services in this case."

1. Vendor's Certification: Requires the original signature of either the provider of the services or the attorney, depending on who is seeking reimbursement.
2. Dept: Will always be CPC
3. Vendor Invoice Number: The first three digits will always be the court code (see Section IX of this Manual.) The next nine digits can be whatever the vendor wants to use as an identification number; usually CPCS attorneys use the nine-digit Notice of Assignment of Counsel number. This number will appear on the check stub.
4. Vendor Code: A vendor code must be established and on file with the Commonwealth before a vendor may be paid. It consists of the social security number and the first four letters of the last name, or a federal income tax identification number and four assigned digits. To establish a vendor code, contact CPCS Private Attorney Payment Department.
5. Vendor Name and Address: Name and address of the person whose vendor code is listed. The Committee must receive written notification of address changes on letterhead with an original signature.
6. Quantity: How many units of work were provided, e.g. hours, copies, etc.
7. Unit Price: Cost per unit, e.g., \$25.00/hour, \$2.50/copy, etc.
8. Amount: Multiply unit price times quantity.

9. Description:
6. Client name
- b. Court
- c. Name of provider of service if different from vendor seeking reimbursement
- d. Type of service provided
- e. See section on documentation below.
10. Amount: Total reimbursement requested.
11. Dates of Services: Dates when services were actually rendered or delivered (in the case of reports or transcripts). PLEASE SUBMIT SEPARATE PV's FOR EACH FISCAL YEAR. A fiscal year runs from July 1 to June 30.
12. After completing the Attorney Verification (where appropriate) forward the packet to the Committee for Public Counsel Services Billing Department, 470 Atlantic Avenue, Suite 700, Boston, MA 02210.

DOCUMENTATION

The following documents must be attached in order for a PV to be processed.

1. Proof of Indigency: An Affidavit of Indigency, a motion authorizing Commonwealth payment of fees due to client's indigency, or a copy of the Notice of Assignment of Counsel form.
2. Proof of Payment: When an attorney requests payment for expenses, monies cannot be advanced. Proof of payment for the service is required. Either a signed receipt or a receipt that CLEARLY shows that the person or company providing the services has been paid PRIOR TO SUBMISSION of the PV is acceptable. A copy of a CANCELED check is recommended.

Reminder:

- ◆ Do not seek reimbursement if you have not paid the vendor. Have the vendor bill us directly. In such cases, where appropriate, sign Attorney Verification and send the PV and supporting documentation to CPCS.
- ◆ Do not seek reimbursement if someone else paid for the costs. Have him or her bill us directly.
- ◆ Do not submit a PV and then include the amount in rate C of an RFP.
- ◆ Separate PVs for each fiscal year must be submitted (the appropriations are fiscal year specific.)
- ◆ Submit your vendor's bill promptly upon completion of vendor's services and your payment of expenses.
- ◆ Vendors must keep itemized time sheets.
- ◆ Vendors must bill **actual** time.
- ◆ Vendors cannot bill waiting time, except as allowed for in-court waiting time.

**Payment Voucher (PV form) can be downloaded in PDF format
(Instruction PV and the blank PV are included in PDF format)**